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Supreme Court, U.S.
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96-114

No._____

IN THE
Supreme Court of the United States
OCTOBER TERM 1995

JOSE ORLANDO GALLEGO,
Petitioner,

v.

SERVICE LLOYDS INSURANCE COMPANY
Respondent.

Brief in Opposition to Petition for Writ of Certiorari To The Court of Appeals For The First District of Texas

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

On June 15, 1990, Mr. Gallego ("Gallego") made a claim for worker's compensation, claiming that he had been injured at work. In 1993, a jury heard his claim and made the fact finding that Gallego was not injured in the course of his employment on June 15, 1990.

Prior to the "no injury" finding, counsel for Gallego was reprimanded by the judge for "race-baiting" the jury.. It was an obvious attempt to bias the jury towards Gallego and wrongfully evoke sympathy. Finally, the Judge heard enough and admonished appellant's counsel for injecting race into the case:

> Now look. Let me tell you something I'm already impressed that there are two things that you are injecting into this case that I don't like, number one you are race-bating these people... I don't want you to turn this into a race case. You understand? There is no reason for that. I know why you're doing it. [Vol. 2 S.F. 11]

The judge continued, "Now if You're going to try this case, try it straight up. You don't try to inject race and you don't try to inject bad faith into this case." [Vol. 2 S.F. 12].

Prior to Gallego's counsel's attempt to race-bait the jury, Gallego gave deposition testimony. In that testimony, he clearly and unambiguously stated that he obtained "residence status" in 1991, after the accident. Counsel for Service LLoyds had a right to rely on a statement made by Gallego himself. In no way was the comment in question lie or intentional misrepresentation. The Texas 1st Court of Appeals agreed. [Opinion P. 15a, fn.3, Petition for Writ of Certiorari.]

This is not a case where Gallego was deprived of a fair trial because of his nationality or status; to the contrary, his own lawyer brandished his nationality and legal status continually and relentlessly in front of the jury.

REASONS TO DENY THE WRIT

A. Misstatements of Facts and Law by the Petitioner, Gallego.

1. During the voir dire of the jury, counsel for Gallego injected legality, race, and nationality into the case.

> Mr. Gallego is here legally, but I'd like to know whether or not that's going to have an affect on anybody, not just the fact that he's a Hispanic seeking to recover under the laws of the United States of America--which he's here legally for--but whether or not it's going to bother anyone. [Vol. 1 S.F. 30]

She continued to dwell on Gallego's nationality and race throughout her voir dire and opening statement. It was counsel for Gallego who injected nationality and status of legality into the case. When Gallego's counsel refused to cease her relentless references to race and nationality, the judge sternly reprimanded her and warned her to stop "race-baiting" the jury.

2. The comment in question was neither a lie nor an intentional misrepresentation.

Counsel for Service LLoyd relied on Gallego's own statement that he did not obtain "residence status" until 1991, after the incident. It was proper to rely on a party

statement from a sworn deposition, thus, the comment was not a lie and it was not an intentional misrepresentation. The Texas Court of Appeals rejected Gallego's argument to the contrary and firmly agreed that it was a reasonable interpretation of Gallego's own testimony. [Opinion P. 15a, fn.3, Petition for Certiorari.]

3. The Texas Court of Appeals correctly determined that there was no error.

Pursuant to Texas law, there was no error in the case, and even if error occurred, it was cured by Gallego's own testimony. Voir dire examination is a matter within the sound discretion of the trial judge and his or her judgment will not be reversed absent a clear abuse of discretion. *Haryanto v. Saeed*, 860 S.W.2d 913, 118 (Tex.App.--Houston [14th Dist.] 1993, no writ.) It was Gallego's own counsel who opened the door during her voir dire examination and invited the comment by Service Lloyds. The Texas Court of Appeals correctly determined that the comment was a response to Gallego's inflammatory voir dire. [Opinion, P. 14a, Petition for Certiorari.]

Further, the Texas Court of Appeals correctly determined that Gallego did not properly preserve any error that might have occurred. [Opinion, P.11a, Petition for Certiorari]("Gallego did not request further instruction to the jury and none was given.") The Court of Appeals also correctly ruled that the comment did not rise to incurable error because Gallego cured any error with his own testimony on the stand that he was here legally and that, additionally, Gallego's attorney was the first to raise the issue to begin with. [Opinion, P. 14a Petition for Certiorari.]

B. The decision of the Texas Court of Appeals does not conflict with the decisions of the Fifth Circuit.

Gallego relies on the *Rojas* case to support his position; however, the *Rojas* case is distinguishable from this case in several important respects. *Rojas v. Richardson*, 703 F.2d 186, (5th Cir.) 1983, *reh'g granted and judgment aff'd* 713 F.2d 116.) In the first *Rojas*, the court determined that reference to a litigant during closing argument as an illegal alien was highly prejudicial, but then it was discovered that, as here, the litigant's own counsel had raised the issue first, and that, as here, the litigant's counsel has failed to properly preserve error. Thus, the argument in closing was no longer incurable argument so the court withdrew the opinion, and affirmed the judgment of the lower court. In *Rojas*, the litigant's counsel only made one mention of the status of legality of his own client. In this case, Gallego's counsel barraged the jury with racial references concerning his status of legality during both voir dire and opening statement, until the judge was forced to stop her and reprimand her for race-baiting the jury. In this case, it was Gallego's own counsel attempting to improperly inflame the jury.

C. Gallego received due process, equal protection, and a fair trial.

Gallego received a fair trial in this case. There was an abundance of evidence that Gallego was not injured in the course of his employment on June 15, 1990. Three witnesses testified, including Gallego's own wife, to events that indicated that he was not injured and that the accident could

not have happened the way Gallego claimed it did. The jury only had to believe one of them. There were a litany of medical tests that all came back negative. The vast majority of evidence and testimony all supported the jury's finding of no injury.

Gallego was not prejudiced by Service Lloyd's comment. The comment was brief, during voir dire, invited by his own counsel, and cured by his own testimony. If he was prejudiced by anyone, it was his own counsel who relentlessly referenced his nationality and status of legality. She never let the jury forget it. Gallego received due process and equal protection under the law. The trial was fair, and the verdict was based on the weight and preponderance of the evidence.

CONCLUSION

The Court should deny the Petition for Certiorari.

Respectfully Submitted,

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No. 01-94-00883-CV

Jose Orlando Gallego
Appellant,

VS.

Service Lloyds Insurance Company
Appellee.

APPELLEE'S BRIEF

TO THE COURT OF APPEALS:

Appellee, Service Lloyds Insurance Company, submits this brief in response to an appeal of a judgment adverse to the appellant.

For clarity, appellant will be refered to as "appellant" and appellee will be referred to as "appellee."

BRIEF OF ARGUMENT (REPLY POINTS 4-6)

REPLY POINT FOUR

The trial court was correct in overruling appellant's motion for mistrial on the grounds of improper jury argument because the verdict was grounded upon proper proceedings and evidence and the argument did not constitute reversible error.

REPLY POINT FIVE

The trial court was correct in overruling appellant motion for new trial on the grounds of incurable jury argument because the argument was not so prejudicial and inflammatory that it could not have been cured.

REPLY POINT SIX

The trial court was correct in overruling appellant's motion for mistrial and motion for new trial because the argument was not so prejudicial and inflammatory as to deny the appellant his right to a fair trial.

STATEMENT OF FACTS FOR REPLY POINTS FOUR, FIVE, AND SIX

During the Voir Dire of the jury, counsel for the appellant injected legality, race, and nationality into the case:

> Mr. Gallego is here legally, but I'd like to know whether or not that's going to have an affect on anybody, not just the fact that he's a Hispanic seeking to recover under the laws of the United States of America -- which he's here legally for -- but whether or not its going to bother anyone. [Vol 1 S.F. 30].

She continued to mention the appellants nationality and race throughout her voir dire and opening statements. The potential jury members were questioned by the appellant on how they felt about someone of the appellant's race and nationality [Vol. 1 S.F. 31, 33]. This opened the door for arguments in those areas.

Appellant complained of an argument by appellee's counsel and made an objection. [Vol. 1 S.F. 43]. After she objected, appellee's counsel replied,"She opened the door. I'll drop it." [Vol. 1 S.F. 43]. **He completely abandoned the argument at that time.** Appellant's counsel went on to mention the race and nationality of the appellant many times. [Vol 2 S.F. 3,4]. The judge finally stopped the appellant's counsel and instructed her to stop race-baiting the jury [Vol. 2 S.F. 11].

The jury returned a verdict of no injury, properly based on the evidence presented in this case. [Vol. 3 S.F. 2].

ARGUMENT AND AUTHORITIES FOR REPLY POINTS FOUR, FIVE, AND SIX

A. Standards of Review for curable and incurable jury argument.

Voir dire examination is a matter within the sound discretion of the trial judge and his or her judgment will not be reversed absent clear abuse of discretion. *Haryanto v. Saeed*, 860 S.W.2d 913, 918 (Tex.App.--Houston [14th Dist.] 1993, writ denied.)

Improper jury argument may only be reversible error if there is (1) an error (2) that was not invited or provoked, (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial, (4) that was not curable by an instruction, by a prompt withdrawal of the statement, or by a reprimand by the judge, and (5) the argument, by its nature, degree, and extent constitutes reversibly harmful error, including the argument's probable effect on a material holding. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839-40 (Tex. 1979). The

appellant must show that the probability that the argument caused harm is greater than the probability that the verdict was based upon proper proceedings and evidence. *Id.* at 839-40.

In determining whether an argument was incurable, the court must examine the argument in light of the whole record, beginning with voir dire and ending with closing argument. *Haryanto v. Saeed*, 860 S.W.2d 913, 919 (Tex.App.--Houston [14th Dist.] 1993, writ denied.) "The court must look at the length of the argument, whether it was repeated or abandoned, whether there was cumulative error, and the probable effect of the argument on a material finding." *Haryanto*, 860 S.W.2d at 920.

B. The argument in this case was not incurable

In this case, the argument was very brief, one sentence. [Vol. 1 S.F. 42-43]. The argument was immediately abandoned by counsel [Vol. 1 S.F. 43] and never again repeated by counsel for the appellee. The argument concerned whether or not the appellant was working in the country legally, a fact the appellant's own counsel injected into the case. Argument outside the record is ordinarily curable by a timely objection and prompt instruction to disregard. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 840-41 (Texas 1979). Because any argument along the lines complained of was promptly discontinued, any error was cured.

The probable effect on the jury's verdict was none. The jury only answered one question, whether or not the appellant was injured. The jury found that the appellant was not injured. [Vol. 3 S.F. 2] The question did not have anything to do with how much money he should receive or at what rate. It was a purely objective question that was

answered based on the preponderance of the evidence that showed that the appellant was not injured.
In light of the brief nature of the argument and the strength of the evidence in support of the jury's verdict of no injury, the appellant's points of error four, five, and six should be overruled.

C. The argument was invited and provoked by counsel for appellant.

Counsel for the appellant invited and provoked any comment made by counsel for the appellee during Voir Dire. Appellant's counsel discussed the appellant's nationality and status of legality at great length in her voir dire and opening statement. During opening statement, she was reprimanded by the judge for attempting to "race bait" the jury. [Vol. 2 S.F. 11].

1. Statements by counsel for appellant during voir dire.

Appellants counsel invited any statements concerning nationality and legality with her remarks made during voir dire. She mentioned the appellant's status in this country several times during voir dire, in an effort to evoke sympathy from the jury for his alien status. " Mr. Gallego is here legally, but I'd like to know whether or not that's going to have an affect on anybody, not just the fact that he's a Hispanic seeking to recover under the laws of the United States of America -- which he's here legally for -- but whether or not its going to bother anyone." [Vol 1 S.F. 30]. She continued with, "He speaks English, but with a very, very heavy thick accent." [Vol. 1 S.F. 31]. When she was discussing the nationality of the appellant and his status in the country, she also spent time asking the jurors how they felt about it. One potential juror replied, "I don't have a

problem with Hispanic gentlemen. I'd just like to know does he speak English at all or understand English at all?" [Vol 1 S.F. 31]. Later on she asked if anyone had a problem "with a man like Mr. Gallego filing a claim for workers compensation" [Vol. 1 S.F. 33]. After counsel was finished with her speech on nationality and legality, the jury had spent several minutes dwelling on the fact that Mr. Gallego was Hispanic, whether or not he was here legally, and the fact he was from Columbia.

It was counsel for the appellant who injected race, nationality, and status of legality into the case. She talked to the jurors about it repeatedly. She kept it on their minds. Appellant's counsel made it an issue in the case.

2. Statements by Counsel for Appellant during Opening Statement

During her opening statement, counsel for the appellant continued to dwell on the appellant's race and nationality. "We can see a slight Hispanic male standing on..." [Vol. 2 S.F. 3] "And we see this Hispanic male spraying and coating..." [Vol. 2 S.F. 3]. "Mr. Gallego, the Hispanic male that we all saw..." [Vol 2 S.F. 4]. She repeatedly brought the fact that the appellant was Hispanic to the jury.

Finally, the Judge heard enough and admonished appellant's counsel for injecting race into the case.

"Now look. Let me tell you something I'm already impressed that there are two things that you are injecting into this case that I don't like, number one you are race-bating these people... I don't want you to turn this into a race case. You understand? There is no reason for that. I know why you're doing it." [Vol. 2 S.F. 11]

The judge continued, "Now if You're going to try this case, try it straight up. You don't try to inject race and you don't try to inject bad faith into this case." [Vol. 2 S.F. 12].

All of the comments in opening statement by the appellant occurred after any argument made by counsel for appellee in voir dire. After the initial objection of appellant's counsel, counsel for the appellee never mentioned race or nationality again. It was only the appellant's counsel who continued to do so until she was stopped by the judge.

C. Any error was not preserved by proper trial predicate.

Error was not properly preserved by the appellant at the time of the alleged error. Immediately after the alleged improper argument, the following exchange took place:

> MS. MAGAN: I was objecting because I thought I heard you say that he was not here legally.
>
> MR. MAHAR: He stated he was illegal when he came in. He wasn't legalized until; 1991. That's a year after the accident. He said it in his deposition.
>
> MS. MAGAN: That's untrue.
>
> MR. MAHAR: I'll read it to you, Judge.
>
> THE COURT: I don't want to listen --
>
> MR. MAHAR: She opened the door. I'll drop it.
>
> MS. MAGAN: Your Honor, at this time -- and perhaps this is a problem because we didn't have our motion in limine before we brought in the jury, and

I'm sorry for that, but I would like to object to any reference that Mr. Gallego came into the United States illegally.

THE COURT: Does it matter, just because she mentioned it?

MS. MAGAN: It's whether or not he was legal at the time he was injured.

THE COURT: Does it make a difference?
MS. MAGAN: I think its awfully prejudicial.

THE COURT: The issue is whether he's here legally.

MR. MAHAR: Why did she even bring it up? I wouldn't have done anything about it, but she brought it up.

THE COURT: Go on to something else. It's not going to be in the charge. It isn't relevant to these people. I may correct it with an instruction.
[Vol. 1 S.F. 43-44].

1. Objection did not preserve error.

A clear and specific objection to the mention of illegality was never given by appellant's counsel at the time of the alleged error. To preserve error, objections must be clear and specific. *McCormick v, Texas Commerce Bank,* 751 S.W.2d 887, 890 (Tex.App.--Houston [14th Dist.] 1988, writ denied). Appellant's objection was neither clear nor specific. [Vol. 1 S.F. 43-44]. To preserve error, objections must be made, and a ruling obtained, at the time of the error. *Texas Employers Ins. Ass'n. v. Haywood,* 266 S.W.2d

856, 858 (Tex. 1954) No ruling was ever obtained from the judge on the objection she did give. [Vol. 1 S.F. 43-44]. Error was not properly preserved at the time of the alleged improper argument and appellant's points of error four, five, and six should be overruled.

2. Motion for instruction did not preserve error.

Error was also not preserved properly through a motion for mistrial or a motion to instruct the jury to disregard. Several hours after the alleged error, just before the jury was seated, counsel for appellant made the following motion to instruct.

> MS. MAGAN: Or I would ask His Honor to instruct the jury to disregard that because of falsity.
>
> THE COURT: I'll deal with that at the end of trial. Your motion is overruled.
> [Vol. 1 S.F. 74]

Objections at the time of trial must be the same as objections on appeal. At trial she moved for an instruction based on the falsity of the statement. On appeal, she is appealing the prejudicial and inflammatory nature of the argument. An objection at trial that is not the same as an objection urged on appeal presents nothing for review. *Haryanto v. Saeed*, 860 S.W.2d 913, 921 (Tex.App.--Houston [14th Dist.] 1993, writ denied.) She did not appeal the argument based on falsity, therefore, error was

not preserved through her motion to instruct the jury and the appellant's points of error four, five, and six should be overruled.

3. No motion for mistrial was made on the record.

No motion for mistrial was made on the record by the appellant. The appellant told the court that a motion for mistrial would be made, but one was not made.

> MS. MAGAN: Madame court reporter has said that she will be able to by tomorrow morning find that place in the record where Mr. Mahar has stated to the jury that Mr. Gallego was work--at the time he was working here illegally, which is untrue. If that is the case, if indeed he said that, and I did question him at the bench at the time that he made that statement, I would ask for a mistrial based on the falsity of misinformation of what the facts are.
>
> THE COURT: Fine. You can find it. If I mistry it, we'll reset it on the docket and we'll be back whenever we get to you. You can make that motion. I don't care it's--
> [Vol 1 S.F. 73-74].

No motion for mistrial was ever made or overruled, one was only discussed. Further, the motion would hve been made on falsity, not prejudice that she is urging on appeal. Thus, error was not properly preserved by a motion for mistrial and the appellant's points of error four, five, and six should be overruled.

D. The argument by its nature degree and extent did not constitute reversibly harmful error.

After the lengthy discussion by appellant's counsel on nationality, race, and legality during voir dire, counsel for appellee said one sentence that appellant argues was improper argument. After that sentence, appellant objected and counsel for the appellee replied,"She opened the door. I'll drop it." [Vol. 1 S.F. 43]. He dropped it and never mentioned it again. Appellant's counsel, however, brought up nationality and race time and time again until finally, the judge instructed her to stop "race-baiting" the jury. [Vol. 2 S.F. 11].

Considering the fact that appellant's counsel spent much time discussing the subject of the comment, that the comment was brief, and no further comments were said (by appellee's counsel), the argument could not rise to reversible error by its nature degree and extent. There are only rare instances of incurable harm from improper jury argument. *Haryanto v. Saeed*, 860 S.W.2d 913, 919 (Tex.App.--Houston [14th Dist.] 1993, writ denied.) This was a case where the argument complained of was brief, and never referred to again. In light of the record as a whole, the argument was not reversible error and appellants points of error four, five, and six should be overruled.

E. Conclusion for Reply Points Four, Five, and Six

Under the facts and circumstances of this case, counsel for the appellee did not commit error during his argument to the jury. The argument complained of was invited and provoked by the counsel for the appellant. It was appellant's counsel who discussed nationality and race at great length with the jury. It was appellant's counsel who was reprimanded by the judge for race-baiting the jury.

The complained of argument was not an incurable argument. When the argument was complained of, that line of argument was abandoned. The argument was not inflammatory or prejudicial. The appellant's counsel had been discussing the issue with the jury throughout her voir dire. Given the circumstances of this particular case and the record as a whole, it is clear that the appellant was attempting to use his nationality to evoke sympathy from the jury. The appellant injected the issue into the case.

The evidence in this case was strong, with two witnesses testifying that the accident could not have happened the way the appellant claimed and medical records that showed he was not injured. The verdict of the jury was soundly based on the evidence, not on prejudice. The judgment of the court below should be affirmed.

Respectfully Submitted,

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No. _____

IN THE
SUPREME COURT
OF TEXAS

Jose Orlando Gallego,
Petitioner,

VS.

Service Lloyds Insurance Company,
Respondent.

Appealed from the First Court of Appeals
Harris County, Texas
Court of Appeals Cause No. 01-94-00883-CV

RESPONSE TO WRIT OF ERROR

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ARGUMENT AND AUTHORITIES FOR REPLY POINT ONE THROUGH SIX

I. The Court of Appeals was Correct in holding that Gallego's attorney invited the comment by opposing counsel during voir dire when she made repeated biased references to the Hispanic ethniticity of her client, including the status of his legality and that any alleged error was curable by an instruction to disregard the statement.

A. Introduction.

Counsel for petitioner is attempting to obfuscate the issues by accusing Respondent's counsel of lying and dishonesty. The facts reveal that counsel for respondent was relying on sworn testimony of the petitioner himself. The facts reveal that the employment authorization card relied upon by petitioner was never offered as evidence in this case, was never authenticated, and was never referred to at trial. The card is completely outside the record and proves nothing. Petitioner's diatribe on unethical behavior ignores the fact that the Respondent relied on Petitioner's own sworn testimony.

B. Standards of Review for curable and incurable jury argument.

Voir dire examination is a matter within the sound discretion of the trial judge and his or her judgment will not be reversed absent clear abuse of discretion. *Haryanto v. Saeed,* 860 S.W.2d 913, 918 (Tex.App.--Houston [14th Dist.] 1993, writ denied.)

Improper jury argument may only be reversible error if there is (1) an error (2) that was not invited or provoked, (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial, (4) that was not curable by an instruction, by a prompt withdrawal of the statement, or by a reprimand by the judge, and (5) the argument by its nature degree, and extent constitutes reversibly harmful error, including the arguments probable effect on a material holding. *Standard Fire Ins. Co. v. Reese,* 584 S.W.2d 835, 839-40 (Tex. 1979). The petitioner must show that the probability that the argument caused harm is greater than the probability that the verdict was based upon proper proceedings and evidence. *Id* at 839-40.

In determining whether an argument is incurable, the court must examine the argument in light of the whole record, beginning with voir dire and ending with closing argument. *Haryanto v. Saeed,* 860 S.W.2d 913, 919 (Tex.App.--Houston [14th Dist.] 1993, writ denied.) "The court must look at the length of the argument, whether it was repeated or abandoned, whether there was cumulative error, and the probable effect of the argument on a material finding." *Haryanto*, 860 S.W.2d at 920.

The First Court of Appeal correctly applied these tests and determined that petitioner was not able to prove any of the elements for incurable argument and that even if there was error it was curable and, in fact, cured. Opinion at 10.

C. The argument was invited and provoked by counsel for petitioner.

Counsel for Petitioner invited and provoked any comment made by counsel for the Respondent during voir

dire. Petitioner's counsel repeatedly discussed the petitioner's nationality and status of legality at great length in her voir dire and opening statement. During opening statement, she was reprimanded by the judge for attempting to "race bait" the jury. [Vol. 2 S.F. 11]

1. Statements by counsel for petitioner during voir dire.

Petitioner's counsel invited any statements concerning nationality and legality with her remarks made during voir dire. She mentioned the appellant's status in this country several times during voir dire, in an effort to evoke sympathy from the jury for his alien status. "Mr. Gallego is here legally, but I'd like to know whether or not that's going to have an effect on anybody, not just the fact that he's a Hispanic seeking to recover under the laws of the United States of America -- which he's here legally for -- but whether or not it's going to bother anyone." [Vol. 1 S.F. 30] She continued with, "He speaks English, but with a very, very heavy thick accent." [Vol. 1 S.F. 31] When she was discussing the nationality of the applicant and his status in the country, she also spent time asking the jurors how they felt about it. One potential juror replied, "I don't have a problem with Hispanic gentlemen. I'd just like to know does he speak English at all or understand English at all?" [Vol. 1 S.F. 31] Later on she asked if anyone had a problem "with a man like Mr. Gallego filing a claim for worker's compensation." [Vol. 1 S.F. 33] After counsel was finished with her speech on nationality and legality, the jury had spent several minutes dwelling on the fact that Mr. Gallego was Hispanic, whether or not he was here legally, and the fact that he was from Columbia.

It was counsel for the petitioner who injected race, nationality, and status of legality into the case. She talked to jurors about it repeatedly. She kept it on their minds and made it an issue in the case. If anyone was trying to use race and nationality to bias the jury, it was the petitioner's own counsel.

2. Statements by Counsel for Petitioner during Opening Statement.

During her opening statement, counsel for the petitioner continued to dwell on petitioner's race and nationality. "We can see a slight Hispanic male standing on..." [Vol. 2 S.F. 3] "And we see this Hispanic male spraying and coating..." [Vol. 2 S.F. 3] "Mr. Gallego, the Hispanic male that we all saw..." [Vol. 2 S.F. 4] She repeatedly and relentlessly brought the fact that the petitioner was Hispanic to the jury.

Finally, the judge heard enough and admonished petitioner's counsel for injecting race into the case. "Now look. Let me tell you something I'm already impressed that there are two things that you are injecting into this case that I don't like, number one you are race baiting these people...I don't want you to turn this into a race case. You understand? There is no reason for that. I know why you're doing it." [Vol. 2 S.F. 11] The judge continued, "Now if you're going to try this case, try it straight up. You don't try to inject race and you don't try to inject bad faith into this case." [Vol. 2 S.F. 12] It required direct admonishment from the trial judge prevent petitioner's attempts to prejudice the jury herself.

All of the comments petitioner made in opening statement were after respondent's statement in voir dire. After the initial objection by petitioner's counsel, counsel for the respondent never mentioned race or nationality again. It was only the appellant's counsel who continued to do so until she was stopped by the judge.

3. Petitioner was Not Deprived of Due Process or Equal Protection.

Petitioner was given a full and complete trial on the merits. Any error that may have occurred was cured by petitioner's own testimony. The comment by respondent did not rise to the level of so inflammatory that it deprived petitioner of a fair trial. After counsel for petitioner finished with her own voir dire and opening statement, the jury could not help to be dwelling on the fact that he was a "Hispanic gentleman" from Colombia.

4. Verdict was Properly Based on Evidence Presented at Trial.

The jury verdict of no injury was properly based on the abundance of evidence presented at trial by respondent that the petitioner was in fact not injured in the course of his employment on June 15, 1990. The comment by respondent's counsel during voir dire had no effect on the jury's verdict, especially since the comment was very brief and only brought up over and over again by petitioner's own counsel

D. Any Error was Not Preserved by Proper Trial Predicate.

Error was not properly preserved by the appellant at the time of the alleged error. Immediately after the alleged

improper argument, the following exchange took place:

MS. MAGAN: I was objecting because I thought I heard you say that he was not here legally.

MR. MAHAR: He stated he was illegal when he came in. He wasn't legalized until 1991. That's a year after the accident. He said it in his deposition.

MS. MAGAN: That's untrue.

MR. MAHAR: I'll read it to you, Judge.

THE COURT: I don't want to listen--

MR. MAHAR: She opened the door. I'll drop it.

MS. MAGAN: Your honor, at this time -- and perhaps this is a problem because we didn't have our motion in limine before we brought in the jury, and I'm sorry for that, but I would like to object to any reference that Mr. Gallego came into the United States illegally.

THE COURT: Does it matter, just because she mentioned it?

MS. MAGAN: It's whether or not he was legal at the time he was injured.

THE COURT: Does it make a difference?

MS. MAGAN: I think its awfully prejudicial.

THE COURT: The issue is whether he's here legally.

MR. MAHAR: Why did she even bring it up? I wouldn't have done anything about it, but she brought it up.

THE COURT: Go on to something else. It's not going to be in the charge. It isn't relevant to these people. I may correct it with an instruction. [Vol. 1 S.F. 43-44].

1. Objection did Not Preserve Error.

A clear and specific objection to the mention of illegality was never given by petitioner's counsel at the time of the alleged error. To preserve error, objections must be clear and specific. *McCormick V. Texas Commerce Bank*, 751 S.W.2d 887, 890 (Tex.App.--Houston [14th Dist.] 1988, writ denied) Petitioner's objection was neither clear nor specific. [Vol. 1 S.F. 43-44] To preserve error, objections must be made, and a ruling obtained, at the time of the error. *Texas Employer's Ins. Ass'n V. Haywood,* 266 S.W.2d 856, 858 (Tex. 1954) No ruling was ever obtained from the judge on the objection she did made. [Vol. 1 S.F. 43-44] Thus, error was not properly preserved at the time of the alleged improper argument.

2. Motion for Instruction did Not Preserve Error.

Error was also not preserved properly through a motion for mistrial or a motion to instruct the jury to disregard. Several hours after the alleged error, just before the jury was seated, counsel for petitioner made the

following motion to instruct:

> MS. MAGAN: Or I would ask His Honor to instruct the jury to disregard that because of falsity.
> THE COURT: I'll deal with that at the end of trial. Your motion is overruled.
> [Vol. 1 S.F. 74]

Objections at the time of trial must be the same as objections on appeal. At trial she moved for an instruction based on the falsity of the statement. On appeal to the First Court of Appeals, she appealed the prejudicial and inflammatory nature of the argument. An objection at trial that is not the same as an objection urged on appeal presents nothing for review. *Haryanto v. Saeed*, 860 S.W.2d 913, 921 (Tex.App.--Houston [14th Dist.] 1993, writ denied.) She did not appeal the argument based on falsity, therefore error was not preserved through her motion to instruct the jury.

Her attempt to refocus her appellate issue of prejudicial and inflammatorily to one of falsity from the Court of Appeals to the Supreme Court should not be given credence. She did not appeal the issue to the Court of Appeals and it should not be allowed to be introduced for the first time in the Supreme Court.

3. No Motion for Mistrial was made on the Record.

No motion for mistrial was made on the record by the petitioner. The petitioner told the court that a motion for mistrial would be made, but one was not made.

> MS. MAGAN: Madame court reporter has said that she will be able to by tomorrow morning find that place in the record where Mr. Mahar has stated to the

> jury that Mr. Gallego was work--at the time he was working here illegally, which is untrue. If that is the case, if indeed he said that, and I did question him at the bench at the time that he made that statement, I would ask for a mistrial based on the falsity of misinformation of what the facts are.
>
> THE COURT: Fine. You can find it. If I mistry it, we'll reset it on the docket and we'll be back whenever we get to you. You can make that motion. [Vol. 1 S.F. 73-74]

No motion for mistrial was ever made or overruled, one was only discussed. Further, the motion would have been made on falsity, not prejudice that she is urging on appeal. (At least that is what she urged on appeal to the First Court of Appeals.) Therefore, error was not properly preserved by a motion for mistrial.

E. The Argument by its Nature, Degree, and Extent did Not Constitute Reversibly Harmful Error.

Even if petitioner had preserved error, the error was not reversible error. After the lengthy discussion by petitioner's counsel on nationality, race, and legality during voir dire, counsel for respondent said one sentence that petitioner argues was improper argument. After that sentence, petitioner objected and counsel for respondent replied, "She opened the door. I'll drop it." [Vol. 1 S.F. 43] He dropped it and never mentioned it again. Petitioner's counsel, however, brought up nationality and race time and time again until finally, the judge instructed her to stop "race-baiting" the jury. [Vol. 2 S.F. 11]

Considering the fact that petitioner's counsel spent much time discussing the subject of the comment, that the

comment was brief, and no further comments were said (by respondent's counsel), the argument could not rise to reversible error by its nature, degree, and extent. There are only rare instances of incurable harm from improper jury argument. *Haryanto v. Saeed,* 860 S.W.2d 913, 919 (Tex.App.--Houston [14th Dist.] 1993, writ denied.) This was a case where the argument complained of was brief and never referred to again. In light of the record as a whole, the argument was not reversible error.

F. Any Error was Cured by Testimony of Petitioner.

As the Court of Appeals noted, even if the statement was error and that error was preserved by petitioner, the error was cured by the testimony of the petitioner himself. The petitioner testified that he was in the country legally at the time of the injury. This testimony cured any error. *See Haryanto*, 860 S.W.2d at 919. Using the reasoning of *Haryanto,* petitioner's counsel had the opportunity to cure, and did cure, any prejudice that might have occurred because of respondent's voir dire comment.

G. Comment Was Not Based on a Lie or Knowing Falsity.

In petitioner's brief his counsel makes several incorrect assumptions that pervade all of her arguments concerning the comment by respondent's counsel. She wrongly states that the comment was a lie made with the intent to deceive; however, the evidence clearly shows that when respondent's counsel made the comment, he was relying on sworn testimony of the petitioner. Whether or not the testimony was interpreted exactly correctly by respondent's counsel does not raise the issue to an ethical question. If petitioner did not approve of the way his sworn testimony was interpreted, he had the opportunity, and used

it, to correct any misinterpretation of his testimony. Petitioner's vehement attack on respondent's counsel and her effort to construe the comment as a malicious attack on petitioner fail utterly in light of the facts and evidence that clearly show respondent's justifiable reliance on the sworn testimony of the petitioner. On the record, respondent's counsel clearly stated his basis for the comment, Mr. Gallego "stated he was illegal when he came in. He wasn't legalized until 1991. That's a year after the accident. He said it in his deposition." [Vol. 1 S.F. 43-44].

The First Court of Appeals addressed this attack by petitioner in their opinion:

Gallego contends that Service Lloyds knowingly made a false statement to the jury panel during voir dire. This is not supported by the record. No evidence showed Gallego's employment authorization card was received from Service Lloyds, as alleged in the motion for new trial. *See Estate of Arrington v. Fields*, 578 S.W.2d 173, 180 (Tex. Civ. App.--Tyler 1979, writ ref'd n.r.e.). Moreover, the authenticity of the purported employment authorization card was never proved. A copy was attached to the motion for new trial, but there was no hearing on the motion for new trial, and the copy is not self proving. Finally, Service Lloyds' response to the motion for new trial contains Gallego's deposition testimony that he obtained "residence status" in 1991, after these events occurred. Opinion p. 11, Fn 3.

Petitioner's attempt to prove knowing falsity rests on her assumption that respondent's counsel "knew" the employment authorization card was authentic even though she did not prove it up or attempt to enter it into evidence. She also asserts that because the petitioner is suing the respondent for defamation, they should concede the case and just assume his allegations are correct. The defamation issue was not tried in this case and is not currently on trial. To suggest that the allegations in that case should be taken as true against the defense attorney is to concede the whole defamation case and deny the respondent of their right to a defense and a trial on the merits.[1]

H. Conclusion for Reply Points One through Six.

The comment complained of was invited and provoked by counsel for petitioner. It was she who injected race, nationality, and status of legality onto the case. It was she who was reprimanded by the judge for "race baiting" the jury. Even if the comment created error, that error was not so inflammatory as to be incurable argument and petitioner failed to preserve error for appeal through proper trial predicates. The comment by its nature, degree, and extent did not constitute reversibly harmful error. The comment was brief and the subject completely dropped by respondent's counsel. Finally the comment was based on the sworn testimony of the petitioner himself. For all of these reasons, petitioner's points of errors one through six should be overruled and the judgments of the trial court and the First Court of Appeals should be affirmed.

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[1] The defamation case was severed from the worker's compensation case to avoid confusion of the issues. Counsel for petitioner was reprimanded by the trial judge for attempting to bring bad faith type issues into the trial, and she is still attempting to inject such inflammatory material into this appeal. [Vol. 2 S.F. 11]

Respectfully Submitted,

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No. 95-0613

IN THE
SUPREME COURT
OF TEXAS

Jose Orlando Gallego,
Petitioner,
VS.
Service Lloyds Insurance Company,
Respondent.

Appealed from the First Court of Appeals
Harris County, Texas

Court of Appeals Cause No. 01-94-00883-CV

ANSWER TO MOTION FOR REHEARING

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ANSWER TO MOTION FOR REHEARING

Respondent, Service Lloyds Insurance Company, submits this Answer to Petitioner's Motion for rehearing and respectfully requests that Petitioner's Motion be denied in its entirety.

STATEMENT OF REPLY POINT
REPLY POINT ONE

The Supreme Court was correct in denying petitioner's writ of error because the Court of Appeals has correctly held that petitioner's attorney invited the comment by opposing counsel during voir dire, that any alleged error was curable by an instruction to disregard the statement, that any alleged error was "cured by the uncontested evidence presented during trial" that the alleged error was not an appeal to racial, religious, or national prejudice, and that the alleged error did not deprive Gallego of a fair trial and did not constitute reversible error.

I. BACKGROUND

During voir dire of the jury, counsel for petitioner injected legality, race, and nationality into the case. She continued to mention petitioner's nationality and race throughout her voir dire and opening statements. The potential jury members were questioned by appellant on how they felt about someone of the appellant's race and nationality. [Vol. 1 S.F. 31, 33] This opened the door for arguments in those areas.

Petitioner complained of an argument by Respondent's counsel and made an objection. [Vol. 1 S.F. 43] After she objected, Respondent's counsel replied, "She opened the door. I'll drop it." [Vol. 1 S.F. 43] He completely abandoned the argument at that time. **Petitioner's counsel, however, went on to mention the race and nationality of the petitioner many times and would not stop until the judge reprimanded her and instructed her to stop race baiting the jury.** [Vol. 2 S.F. 3, 4, 11]

II.

BRIEF OF ARGUMENT
REPLY POINT ONE

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III.

ARGUMENT AND AUTHORITIES FOR REPLY POINT ONE

The Court of Appeals was correct in affirming the jury's verdict of no injury in this case. Counsel for petitioner is attempting to obfuscate the issues. The only attorney to act improperly and make statements designed to bias the jury was counsel for the petitioner. The facts reveal that the statement in question, made by counsel for respondent, was clearly based on sworn testimony of the petitioner himself. As the Court of Appeals noted in their Opinion, the petitioner gave sworn deposition testimony that he was not a legal resident until 1991. *Opinion p.11, Fn 3.* Counsel for the Respondent was entitled to rely on the statements made by the petitioner, and counsel for the petitioner was at the deposition where she had the full opportunity to clear up any alleged misunderstandings. The Court of Appeals further agreed that petitioner's own attorney was the first to raise the issue of petitioner's nationality in her effort to "race-bait" the jury. *Opinion p. 10-11.*

Voir dire examination is a matter within the sound discretion of the trial judge and his or her judgment will not be reversed absent clear abuse of discretion. *Haryanto v. Saeed,* 860 S.W.2d 913, 918 (Tex.App.--Houston [14th Dist.] 1993, writ denied.)

Improper jury argument may only be reversible error if there is (1) an error (2) that was not invited or provoked, (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial, (4) that was not curable by an instruction, by a prompt withdrawal of the statement, or by a reprimand by the judge, and (5) the argument by its nature degree, and extent

constitutes reversibly harmful error, including the arguments probable effect on a material holding. *Standard Fire Ins. Co. v. Reese,* 584 S.W.2d 835, 839-40 (Tex. 1979). The petitioner must show that the probability that the argument caused harm is greater than the probability that the verdict was based upon proper proceedings and evidence. *Id* at 839-40. In this case, petitioner failed to show any one of the requirements.

In determining whether an argument is incurable, the court must examine the argument in light of the whole record, beginning with voir dire and ending with closing argument. *Haryanto v. Saeed,* 860 S.W.2d 913, 919 (Tex.App.--Houston [14th Dist.] 1993, writ denied.) "The court must look at the length of the argument, whether it was repeated or abandoned, whether there was cumulative error, and the probable effect of the argument on a material finding." *Haryanto*, 860 S.W.2d at 920.

The First Court of Appeal correctly applied these tests and determined that petitioner was not able to prove any of the elements for incurable argument and that even if there was error it was curable and, in fact, cured. *Opinion at 10.*

Petitioner was given a full and complete trial on the merits. Any error that may have occurred was cured by petitioner's own testimony. The comment by respondent did not rise to the level of so inflammatory that it deprived petitioner of a fair trial. After counsel for petitioner finished with her own voir dire and opening statement, the jury could not help but to dwell on the fact that petitioner was a "Hispanic gentleman" from Colombia.

The jury verdict of no injury was properly based on the abundance of evidence presented at trial by respondent that the petitioner was in fact not injured in the course of his

employment on June 15, 1990. The comment by respondent's counsel during voir dire had no effect on the jury's verdict, especially since the comment was very brief and only brought up over and over again by petitioner's own counsel.

Considering the fact that petitioner's counsel spent much time discussing the subject of the comment, that the comment was brief, and no further comments were said (by respondent's counsel), the argument could not rise to reversible error by its nature, degree, and extent. There are only rare instances of incurable harm from improper jury argument. *Haryanto v. Saeed,* 860 S.W.2d 913, 919 (Tex.App.--Houston [14th Dist.] 1993, writ denied.) This was a case where the argument complained of was brief and never referred to again. In light of the record as a whole, the argument was not reversible error.

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In petitioner's Motion for Rehearing his counsel makes several incorrect assumptions that pervade all of her arguments concerning the comment by respondent's counsel. She wrongly states that the comment was a lie made with the intent to deceive; however, the evidence clearly shows that when respondent's counsel made the comment, he was relying on sworn testimony of the petitioner. If petitioner did not approve of the way his sworn testimony was

interpreted, he had the opportunity, and used it, to correct any misinterpretation of his testimony. Petitioner's vehement attack on respondent's counsel and her effort to construe the comment as a malicious attack on petitioner fail utterly in light of the facts and evidence that clearly show respondent's justifiable reliance on the sworn testimony of the petitioner. On the record, respondent's counsel clearly stated his basis for the comment, Mr. Gallego "stated he was illegal when he came in. He wasn't legalized until 1991. That's a year after the accident. He said it in his deposition." [Vol. 1 S.F. 43-44].

The First Court of Appeals addressed this attack by petitioner in their opinion:

> Gallego contends that Service Lloyds knowingly made a false statement to the jury panel during voir dire. This is not supported by the record. No evidence showed Gallego's employment authorization card was received from Service Lloyds, as alleged in the motion for new trial. *See Estate of Arrington v. Fields*, 578 S.W.2d 173, 180 (Tex. Civ. App.--Tyler 1979, writ ref'd n.r.e.). Moreover, the authenticity of the purported employment authorization card was never proved. A copy was attached to the motion for new trial, but there was no hearing on the motion for new trial, and the copy is not self proving. Finally, Service Lloyds' response to the motion for new trial contains Gallego's deposition testimony that he obtained "residence status" in 1991, after these events occurred. Opinion p. 11, Fn 3.

Petitioner's attempt to prove knowing falsity rests on her assumption that respondent's counsel "knew" the employment authorization card was authentic even though she did not prove it up or attempt to enter it into evidence.

As the plaintiff in the trial court, the petitioner had the burden of proof on the jury question of injury. *Reed v. Aetna,* 535 S.W.2d 377, 378 (Tex.App.--Beaumont 1976, writ ref'd n.r.e.) The jury found by a preponderance of the evidence that the petitioner was not injured in the course of his employment. [Vol. 3 S.F. 1] The accident was an unwitnessed accident and the plaintiff was the only witness to testify as to the occurrence of the alleged fall. While the jury could have accepted the testimony of the petitioner, it was not bound to do so. *Glockzin* at 667. The jury is entitled to disbelieve the claimant's testimony and render a verdict against the claimant. *Reed* at 380. That is exactly what happened in this trial, the jury listened to all of the evidence and decided not to believe the petitioner.

CONCLUSION AND PRAYER

The comment complained of was invited and provoked by counsel for petitioner. It was she who injected race, nationality, and status of legality onto the case. It was she who was reprimanded by the judge for "race baiting" the jury. Even if the comment created error, that error was not so inflammatory as to be incurable argument. The comment by its nature, degree, and extent did not constitute reversibly harmful error. The comment was brief and the subject completely dropped by respondent's counsel. Finally the comment was based on the sworn testimony of the petitioner himself. For all of these reasons, petitioner's Motion for Rehearing should be denied.

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